No. 80-441

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1980

Gulf Oil Company, et al., Petitioners,

v.

Wesley P. Bernard, et al., Respondents.

On Writ of Certiorari to the
United States Court of
Appeals for the
Fifth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA AND THE GEORGE WASHINGTON LAW REVIEW, *AMICI CURIAE*

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United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967) 23,38

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Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) 22

Federal Judicial Center, *Manual for Complex Litigation* (1978 ed.)
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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA AND THE GEORGE WASHINGTON LAW REVIEW, *AMICI CURIAE*

INTEREST OF AMICI*/

The American Civil Liberties Union Fund of the National Capital Area is the Washington, D.C. area litigation branch of the American Civil Liberties Union (ACLU), a nationwide organization of over two hundred thousand members which for sixty years has been dedicated to defending the principles

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*/ Counsel for all parties have consented to the filing of this brief. Copies of their letters to that effect are being filed with the Clerk.

embodied in the Bill of Rights, preeminent among them the First Amendment.

The ACLU has been involved, as counsel or as *amicus curiae*, in numerous First Amendment cases in this Court, including several that addressed the power of the courts to regulate speech in connection with judicial proceedings, *e.g.*, *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980).

The ACLU's interest in protecting the ability of counsel to communicate with members or prospective members of a class is quite direct, since much ACLU litigation is class action litigation. This Court recently stuck down a South Carolina disciplinary action against an ACLU cooperating attorney who was assembling plaintiffs for a class action. *See In re Primus*, 436 U.S. 412, 418 n.8 (1978). Many of the significant civil liberties cases brought by

the ACLU in the Washington, D.C. area have been class actions in which ACLU's ability to communicate with class members has been important to the conduct of the litigation. *E.g., Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977)(both challenging legality of mass "sweep arrests" in 1971); *Gomez v. Wilson*, 477 F.2d 411 (D.C. Cir. 1973)(challenging legality of police "investigatory stop" procedures); *Weber v. Turner*, No. 80-0412 (D.D.C. filed February 12, 1980)(challenging sex discriminatory employment practices at the Central Intelligence Agency).

The George Washington Law Review is a non-profit legal journal published by the students of the National Law Center of the George Washington University. The *Review* has on many occasions sought to inform and persuade the courts and the legal community on First Amendment issues. Recently, the

staff has written Notes on cases raising questions similar to those raised here. *See, e.g.*, Note, *If the Issuance of a Protective Order Pursuant to Federal Rule 26(c) Would Restrain Expression, the District Court Must Determine the Order's Constitutionality -- In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), 48 Geo. Wash. L. Rev. 486 (1980).

This Court granted certiorari in the instant case during the *Review's* preparation of a Note on the en banc decision below. The *Review* believed that the results of its research on the constitutional issues presented might be helpful to this Court's consideration of the case.

Amici believe that the order issued in this case was an unconstitutional prior restraint for the reasons given by the Fifth Circuit. We show in this brief that there are important additional reasons why such an order should not be countenanced under the First Amendment.

SUMMARY OF ARGUMENT

I. COURT RULES OR ORDERS RESTRICTING COMMUNICATIONS WITH CLASS MEMBERS WOULD SERIOUSLY INTERFERE WITH LITIGANTS' ABILITY TO PROTECT CONSTITUTIONAL RIGHTS THROUGH LITIGATION.

Communications with potential class members serve the important purpose of locating members of the class who may not be locatable at a later date, thereby obtaining their evidence and preserving their ability to obtain a remedy if the suit is successful.

A ban on communications with potential class members is necessarily a ban on publicity generally. Such a ban prevents the public dissemination of information about subjects of public importance, and thereby prevents the politically active from persuading others of the correctness of their position on important public issues. This is an intolerable infringement of a core interest protected by the First Amendment.

II. THE ORDER VIOLATES THE FIRST AMENDMENT.

A. The Order Restrains Constitutionally Protected Expression.

In this class action, the speech of the plaintiffs and their attorneys was clearly political in nature and therefore within the ambit of First Amendment protection. Expressional activity aimed at vindicating claims of racial discrimination has been explicitly held by the Supreme Court to be protected. Over half of all federal class actions are civil rights suits. Allowing wholesale restraint on communication merely because it occurs in the class action context is therefore inappropriate.

The rationale for protecting speech in class actions is, however, not limited to civil rights suits. Class actions provide a means for the broad implementation of constitutional and statutory policies. This Court's protection of litigation-related expression has not been limited to

political expression. Because rights of free speech are not confined to any particular field of human endeavor, the speech of class action litigants is protected even if economic rights are involved.

The district court's order infringed upon the class members' right to receive information and ideas. An effort to protect members of the class by quarantining them from information is inconsistent with the philosophy of the First Amendment -- that informed citizens will be best able to make decisions. Prospective class members can only protect their interests if they receive information about the choices available to them. Moreover, preventing interaction between class members and class representatives hinders proper development of class suits, and infringes on the basic right of collective activity undertaken to obtain meaningful access to the courts.

The order challenged in this action restrained communications necessary to catalyze associational ties among persons who may be suffering a common injury caused by unlawful racial discrimination.

B. Constitutionally Protected Expression Does Not Lose Its Protection Merely Because It Occurs in the Context of Litigation.

Courts are not exempt from constitutional strictures which the First Amendment places on governmental action. Neither do persons who seek to vindicate their rights through civil litigation, or their legal representatives, waive their First Amendment rights. Nor are attorneys, in their capacity as officers of the court, transmuted into government agents whose First Amendment rights may be validly circumscribed.

C. The Order Does Not Satisfy Traditional First Amendment Standards for Restrictions on Protected Expression.

Governmental restrictions which burden vital First Amendment freedoms are subject to the strictest scrutiny. Even if the governmental purpose is legitimate and substantial, as it is for protecting the administration of justice, the restriction must be extremely narrow, and can only be imposed if no less onerous alternatives are available. Moreover, to be permissible it must be shown that the restraint is directed at a substantive evil which will actually impede the fair administration of justice. Even then, however, the threat must be grave and urgent. A majority of courts have adopted a standard requiring that there be a serious and imminent threat to the administration of justice before litigants' and lawyers' expression can be restrained. This standard best comports with Supreme Court decisions regarding sanctions on litigation-related communication. The order in the instant case does not satisfy

these requirements. Not only is the order extremely broad, but it does not rely upon any serious or imminent threats to the administration of justice as a justification for its imposition.

Any attempt to save the order by exempting constitutionally protected expression merely trades overbreadth for vagueness. The Constitution by itself does not provide clear enough guidelines to enable a person to determine whether or not his speech is protected, where, as here, other provisions of the order forbid all speech under penalty of contempt.

ARGUMENT

I. COURT RULES OR ORDERS RESTRICTING COMMUNICATIONS WITH CLASS MEMBERS WOULD SERIOUSLY INTERFERE WITH LITIGANTS' ABILITY TO PROTECT CONSTITUTIONAL RIGHTS THROUGH LITIGATION.

One of the major ways in which the ACLU attempts to protect the constitutional rights of individuals is through litigation, and a substantial proportion of ACLU's

important cases are brought as class actions.

Court rules or orders, such as those suggested by the *Manual for Complex Litigation* (the *Manual*), Part II, § 1.41 (1978 ed.), which would restrict ACLU attorneys' or clients' ability to communicate with potential class members, would substantially interfere with ACLU's ability to prepare and develop effective class actions. Frequently, it is only after the filing of a class action lawsuit, with its attendant publicity, that new plaintiffs come forward to join the suit. Such new plaintiffs, and the facts of their individual claims, often help to establish the existence of a certifiable class and to flesh out the range of issues involved in the lawsuit. The order's ban on indirect communications would prohibit such publicity and thus prevent potential plaintiffs from learning of the suit and coming forward.

Moreover, it is often very much easier and less expensive to locate potential class members at the initial stage of the litigation, even before the class is certified or court-ordered notice is sent to potential class members -- an event that often occurs months and even years after the case is filed, despite the exhortation to prompt action of Rule 23(c)(1).

At the inception of the case, class members are more likely still to be living in the same area, working for the same employer, or participating in the same government program, as at the time of the injury complained of. They are more likely still to have records or access to witnesses that can establish their claim and the claims of other class members. They are more likely still to be in contact with other members of the putative class who can bring the case to their attention or to whose

attention they can bring the case. As time passes, class members move out of the area, lose their records, and lose contact with other individuals who might alert them to their membership in the class. Not only may the later inability to locate such persons be detrimental to plaintiffs' ability to litigate the class action, it will also result in the denial to such unlocated class members of any recovery to which they may be adjudged entitled.

ACLU's experience in one notable set of cases is exemplary. During the first week of May, 1971, approximately 13,000 people were arrested in Washington, D.C. during the "Mayday" demonstrations against the war in Vietnam. Most were arrested in mass "sweep arrests" which indiscriminately rounded up the innocent with the guilty. Adequate arrest records were not kept, and hundreds of innocent arrestees were held for several days under inhumane conditions

before even being arraigned. *See Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977). Shortly after these arrests, the ACLU brought a series of class actions on behalf the arrestees, seeking declaratory relief, expungement of arrest records, and damages for violation of their constitutional rights and for false arrest and imprisonment. *Id.* Through newspaper advertisements and widespread publicity, the ACLU was able to locate a large number of the arrestees. Even under these circumstances, many were never located. But ACLU's later attempts to locate class members -- after classes were certified and again after damages were awarded or settlements reached -- have been much less successful. If the ACLU had been restrained from communicating with class members, directly or indirectly through the news media, at the

inception of these cases, there can be no doubt that a great many illegally arrested individuals would never have received the relief to which they were entitled.

The "Mayday" cases illustrate the serious evil that will result from the use of court rules or orders of the type here at issue. The order forbids communication "directly or indirectly" with potential class members. (J.A. 124). Necessarily, then, it forbids the parties, as well as their attorneys, from having virtually any contact with the press about the case, since any reports of their statements would be likely to reach potential class members. A court rule or order such as that issued here, by effectively barring communications with the press, would seriously interfere with the ACLU's ability to achieve its public interest goals through the executive or legislative action that such publicity can spur. For example, in a recent controversy

over the strip-search policy of the Alexandria, Virginia sheriff's office, the public outcry that resulted from the publicity accompanying the filing of lawsuits, including an ACLU class action (*De Mier v. Arlington County*, No. 80-1086-A (E.D. Va., filed November 12, 1980)), resulted in the sheriff's abandoning his policy, at least for the nonce. *See* Washington Post, December 23, 1980, at A-1 col. 7.[1/] This is precisely the role for public opinion which the First Amendment was designed to protect. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

[1/] Because the district court dismissed the first strip search case to come before it, *see Logan v. Shealy*, No. 80-210-A (September 30, 1980), *appeal filed*, No. 80-1815 (4th Cir. November 21, 1980), certification of a class and Rule 23 notice in the ACLU class action may well have to await the outcome of the pending appeal. Thus, as noted above, potential class members who came forward as a result of the publicity might otherwise have become unlocatable by the time Rule 23 notices were sent out.

Having canvassed some of the practical harms that are likely to result from the issuance of judicial orders forbidding communication with potential class members, we turn to the legal analysis of such orders under the First Amendment.

II. THE ORDER VIOLATES THE FIRST AMENDMENT.

As the Fifth Circuit recognized below, the gag order entered by the district court is a prior restraint on communication. (J.A. 243, 266). For the reasons that court noted, the order cannot stand. *See Near v. Minnesota*, 283 U.S. 691 (1931); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). As we will now show, the order also violated First Amendment standards applicable outside the prior restraint area.

A. The Order Restrains Constitutionally Protected Expression.

This Court has never directly addressed the question of First Amendment limitations on judicial power to restrain litigants'

and lawyers' expressive activity in the context of ongoing civil litigation. This is an important question because of the pivotal place held in our democratic society by the cluster of fundamental freedoms that make up freedom of expression -- freedom of speech and press, of assembly and association, the right to hear as well as to speak.

Each of these facets of freedom of expression is implicated by the district court's order in this case. Freedom of speech is implicated because class action litigants and their attorneys are subjected to a far-reaching prohibition on communication with class members about the lawsuit. The right of class members to receive information is concomitantly restricted. Freedom of press, which is equally the right of the pamphleteer as of the large newspaper, *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972), is implicated because the plaintiffs were prohibited from disseminating their pamphlet

to potential class members (J.A. 130-33, 157). Freedom of association and assembly are implicated because persons who had allegedly suffered similar injuries were prevented from joining together for the purpose of communicating and optimally effectuating redress.

1. The Order Restrains Political Speech.

In this class action, the speech of the plaintiffs and their attorneys was clearly political in nature and therefore protected. Its purpose was to redress perceived racial discrimination in employment. This Court has explicitly held that activity aimed at vindicating claims of racial discrimination through litigation is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428-31 (1967). *Button* specifically protected such activities by the NAACP Legal Defense Fund, the same entity restrained by the district court's order here.

Id. at 421-22, 428. *In re Primus, supra,* subsequently reaffirmed the constitutional protection afforded political speech on behalf of nonprofit groups which litigate civil rights and civil liberties claims. The Constitution protects advocacy of lawful ends through constitutionally protected means, including litigation. *NAACP v. Button, supra,* at 429. The implementation of our strong national policies regarding eradication of discrimination, as evidenced by equal employment legislation, is a lawful end. Civil rights suits aimed at ending discrimination commonly use the class action format. *See, e.g., Luevano v. Campbell,* No. 79-0271 (D.D.C., motion for preliminary approval of consent decree filed January 9, 1971)(challenging use of PACE exam for federal hiring).

The *Manual for Complex Litigation, supra,* Part II, § 1.41 (J.A. 97-98), recommends the use of its local rule or pretrial order to

restrain communications in all class actions. Over half of all class actions pending in federal district courts are civil rights suits. Moreover, almost fifteen percent of civil rights suits are class actions. *See* Administrative Office of the United States Courts, *1980 Annual Report* A-22 to -23, -166 to -167. Since class actions are usually brought to adjudicate large numbers of claims, it can fairly be assumed that more persons' civil rights are adjudicated via class actions than otherwise. By authorizing wholesale restraint on communication merely because it occurs in the context of class actions, the *Manual* invites massive restraint on political speech, and hinders one of the most efficient mechanisms for the vindication of civil rights.

The rationale for protecting speech in class actions is not limited to civil rights class actions. The class action is a vehicle for the broad implementation of

constitutional and statutory policies, *see, e.g.*, Cappolleti, *Vindicating the Public Interest Through the Courts*, 25 Buffalo L. Rev. 643, 644 (1976), often through "lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964). In such litigation, "the subject matter of the lawsuit is not a dispute about private rights, but a grievance about the operation of public policy." Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302 (1976). The economies of scale and the equalization of the parties engendered by class actions make it feasible to redress injuries and protect interests which, if left to individual litigation, would not be vindicated because of fear, ignorance, or lack of resources or because the individual right is too small or too diffuse. *See, e.g.*, Yeazell, *Group*

Litigation and Social Context: Toward a History of the Class Action, 77 Colum. L. Rev. 866, 867 (1977).

2. Even If the Speech Restrained Is Viewed as Commercial, It Is Still Protected.

This Court has made it clear that protection of litigation-related communication is not limited to purely political expression. *See United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 221, 223 (1967). Even speech which does no more than propose a commercial transaction does not lack all First Amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748, 762 (1978). Thus the speech of class action litigants and lawyers is protected even if economic rights are implicated.[2/]

[2/] Indeed, if the bare fact that a speaker stands to gain money from his expression removed it from the ambit of the First Amendment, newspapers would have no protection for news stories.

The district court's order specifically restrains solicitation of funds and of agreements to pay fees and expenses from class members who are not formal parties to the action. (J.A. 124). Yet this Court has held that speech is protected even though it may involve a solicitation to pay or contribute money. *Virginia Board of Pharmacy v. Virginia Citizens Council, Inc.*, *supra*, at 761 (citing cases); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 631-32 (1980). Class actions to vindicate important rights may be unable to go forward without the wherewithal to pay attorneys' fees and expenses. Contributions from the class whose rights are at issue and who may ultimately benefit from the litigation are a wholly legitimate means of effectuating their underlying rights.[3/]

[3/] *Cf. Buckley v. Valeo*, 424 U.S. 1, 19 (1975). Several courts have rejected the *Manual's* model in this regard, recognizing the inappropriateness of such restrictions. *See Coles v. Marsh*, 506 F.2d 186, 189 (3d Cir. 1977), *cert. denied sub nom. Blue Cross*

3. The Order Infringes Class Members' Right to Hear About Litigation Affecting Their Interests.

The First Amendment also embraces the right to receive information and ideas. *See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, supra,* at 756-57; *Kleindienst v. Mandel,* 408 U.S. 753, 762 (1972); *Richmond Newspapers v. Virginia, supra.* Our system of government, established by the Constitution, is predicated on the participation of informed citizens in decisions which affect their destiny. *See Bates v. Little Rock,* 361 U.S. 516, 522-23 (1960). Plaintiffs' attorneys in the case at bar sought to provide information about the lawsuit which potential class members had a

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3/ footnote continued

of Western Pennsylvania v. Marsh, 439 U.S. 916 (1978); *Zarate v. Younglove,* 22 Fair Empl. Prac. Cas. 1025, 1039 (C.D. Cal. 1980) (citing ABA Committee on Professional Ethics, Opinion No. 1280, which holds that it is permissible for a class action litigant to solicit funds to pay the attorney); *Norris v. Colonial Commercial Corp.,* 77 F.R.D. 672, 673 (S.D. Ohio 1977).

right to receive. The district court's order seriously infringed this right. *See Zarate v. Younglove*, *supra*, at 1027.

Petitioners claim that they are anxious to protect potential members of the opponent class, as they fear that class members will become confused, and chaos and disenchantment will result. Brief for Petitioners at 19-20, 23 & n.17, 29, 36-37. However,

> this protectiveness rests in large measure on the advantages of their being kept in ignorance. . . . There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Virginia Pharmacy Board v. Virginia Consumer Council, *supra*, at 769-70. Normally, counterargument and education, rather than

censorship, are the antidotes for harmful speech. *See Wood v. Georgia*, 370 U.S. 375, 389 (1962). Court-ordered notice to the class regarding the lawsuit and any government-negotiated or other settlement is not guaranteed to be even remotely adequate to inform affected individuals about the nature of their choices. Indeed, the notice may not even be intelligible to them. *See* J.A. 128-29.[4/]

Class members' lack of sophistication may thus make it necessary and desirable for them to have personal encounters with legally trained personnel who can elucidate the notice. One court postponed a settlement until plaintiffs' attorneys had the opportunity to explain it to class members.

[4/] *See* Settlements, *Rodgers v. United States Steel Corp.*, 4 Class Act. Rep. 509, 509-13 (1975), for an expert linguistic analysis of one such notice, showing it to be substantially above the reading level of the class members and syntactically biased in favor of the settlement over the litigation.

Rodgers v. United States Steel Corp. (Rodgers II), 536 F.2d 1001, 1009 (3d Cir. 1976). In the instant case, however, Gulf's notice instructed employees not to discuss the settlement offer with others. Notice to Offerees, *Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979)(Brief for the United States as Amicus Curiae, Exhibit 1). Plaintiffs in the case at bar were prevented from distributing a pamphlet simply advising offerees to consult an attorney before making a decision (J.A. 131-32, 157). It is not enough that the district court's order restraining communications exempted those initiated by the non-client class member. (J.A. 125). Freedom to speak and to hear may not be abridged merely because the listeners could come upon the message by some other means, such as "digging it up" for themselves. *Virginia Pharmacy Board v. Virginia Consumer Council*, *supra*, at 756-57 & n.15.

This Court has expressed its concern that aggrieved persons receive information regarding their legal rights and the means of effectuating them. *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977). This concern applies with at least as much force to individuals as to groups. *Id.* Individual class members will be bound by a class action judgment unless it is brought under Federal Rule of Civil Procedure 23(b)(3) and they exercise their prerogative to opt out. It is therefore desirable that these individuals become involved in the litigation at an early stage. *Zarate v. Younglove, supra,* at 1037. Actual or potential class members will thus be able to participate, voice their concerns, and provide information which will help to shape the issues. The class members and the attorney for the class will be able to provide the mutual guidance characteristic of the normal attorney-client relationship. As

one court has noted, plaintiffs' interest in obtaining information from class members to help prosecute the action far outweighs the government's interest in preventing plaintiffs' counsel from seeking to increase his fee. *Zarate v. Younglove*, *supra*, at 1038.

Indeed, as the *Manual* itself observes, to deprive class litigants and lawyers of the opportunity to communicate with class members in developing their case may well constitute a denial of due process. *Manual*, *supra*, Part I, § 1.41, at 50. "[C]ollective activity undertaken to obtain *meaningful* access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585-86 (1971) (emphasis added). Restrictions on communications between class representatives and class members can deprive the collective activity of meaningfulness and thus infringe this fundamental right. Government can reach the same policy goals without using means which restrain the flow of truthful

information concerning lawful activity pursued to vindicate collective rights.

4. The Order Infringes Freedom of Association.

Freedom of association is also implicated by the order. Membership in a group is not a prerequisite to invoking the protections of freedom of association. This Court protected the litigation-related activities in *NAACP v. Button, supra,* at 434-35, 443, not only with regard to NAACP members, but non-members as well. Moreover, this protection emcompasses freedom to seek and form new affiliations. This Court has overturned governmental regulations which deterred persons from joining groups. *E.g., Bates v. Little Rock, supra,* at 524. Whether or not the beliefs sought to be advanced by association are political in nature is immaterial. *NAACP v. Alabama,* 357 U.S. 449, 460-63 (1958).

The order in the case at bar interferes with these freedoms. It restrains communication that could catalyze associational ties. Specifically, the order impermissibly discourages association by requiring parties and counsel who seek permission to communicate to file the names of the prospective addresses. It also requires those who seek to take advantage of the exception for constitutionally protected expression to file with the court copies of all written communications and substantially complete summaries of all oral communications, as well as the names of recipients. (J.A. 124-25). Class members in an employment discrimination action will often be reluctant to communicate with persons in an adversary relationship to their employer if these communications are not kept private. Freedom of association necessarily includes privacy of association when exposure would occasion adverse consequences, including

the displeasure of those who control one's professional destiny. *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *NAACP v. Alabama, supra*, at 462; *Louisiana v. NAACP*, 366 U.S. 293, 296 (1961). First Amendment freedoms are protected not only against frontal attack but also against the chilling effect of more subtle governmental interference, such as disclosure of affiliations. *Cf. Bates v. Little Rock, supra*, at 522-23.

B. Constitutionally Protected Expression Does Not Lose Its Protection Merely Because It Occurs in the Context of Litigation.

Courts are not exempt from the constitutional strictures of the First Amendment. "[T]he interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." *Rodgers v. United States Steel Corp. (Rodgers I)*, 508 F.2d 152, 163 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975).

No doubt courts, like other governmental entities, would in some situations find it more convenient to pursue their laudable goals through methods that "broadly stifle fundamental liberties." *Shelton v. Tucker, supra,* at 488. The Constitution, however, forecloses this option. The courts are entrusted with the safeguarding of these vital liberties against governmental infringement. The courts, as guardians, must also guard themselves.

Persons who elect to vindicate their rights through civil litigation, and the lawyers who represent them, should not thereby be compelled to surrender their First Amendment rights. Government may not condition its bestowal of a right or even of a privilege on the sacrifice of a constitutional right. *See Sherbert v. Verner,* 374 U.S. 398, 404 (1963).[5/]

[5/] The congressional grant of power from which authority for federal district courts to promulgate rules and orders ultimately

Nor can it be assumed that litigants and lawyers have, by submitting to the court's jurisdiction, implicitly and voluntarily signed away their First Amendment rights. *Rodgers v. United States Steel Corp. (Rodgers II)*, *supra*, at 1006-07. Waiver of a constitutional right is not lightly inferred and every reasonable presumption against it is indulged. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Emspak v. United States*, 349 U.S. 190, 196 (1955). This Court has not been willing to find such a waiver in circumstances that fall short of clear and compelling. *Rodgers v. United States Steel Corp. (Rodgers II)*, *supra*, citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1957). *See also*

5/ footnote continued

derives specifically provides that they shall not abridge or modify any substantive right. Rules Enabling Act, 28 U.S.C. § 2072 (1976).

In re Halkin, 598 F.2d 176, 186, 189 (D.C. Cir. 1979).

Nor do attorneys by virtue of their capacity as "officers of the court" come within any exception to the First Amendment recognized as to political activities of government employees. This Court has consistently refused to assimilate private attorneys into the category of government agents merely by virtue of that title. *See Perri v. Ackerman*, 444 U.S. 193, 202 & n.19 (1979), and cases cited. But Petitioners attempt to do this very thing by identifying private attorneys with the court. Brief for Petitioners at 30. Their invocation of *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), a decision regarding restrictions on the speech of government employees, is simply inapt. *Letter Carriers* cannot be used as a premise for wholesale derogation of attorneys' First Amendment rights.

C. The Order Does Not Satisfy Traditional First Amendment Standards for Restrictions of Protected Expression.

Governmental restrictions that burden vital First Amendment freedoms are subject to the strictest scrutiny. *NAACP v. Alabama, supra,* at 460-61. To justify such a restriction, the government must demonstrate a subordinating interest which is compelling. The interest sought to be protected by the order in the instant case, as recommended by the *Manual,* is the administration of justice. It is beyond cavil that this is a protectible interest. *Wood v. Georgia, supra,* at 383. This is undoubtedly true for civil as well as criminal trials, although the Sixth Amendment hedges more stringent protections around the criminal trial. *See Hirschkop v. Snead,* 594 F.2d 356, 373 (4th Cir. 1979)(en banc).

But restrictions on First Amendment freedoms cannot be upheld merely because

they address some matter that is within governmental competence, or even because they provide a helpful means of dealing with that matter. *United Mine Workers v. Illinois State Bar Association, supra,* at 222. A mere incantation of the term "administration of justice" does not, therefore, put an end to First Amendment analysis. Nor does an incantation of the term "abuse of the class action device." Constitutional rights cannot be foreclosed by mere labels. *NAACP v. Button, supra,* at 429.

1. The Order Is Not the Narrowest Available Means.

First, "even if the governmental purpose is legitimate and substantial, it cannot be achieved by means which broadly stifle fundamental liberties when the end can be more narrowly achieved." *Shelton v. Tucker, supra,* at 488. Governmental action which encroaches upon these basic rights must be tailored to the needs of the particular

case, and framed in the narrowest possible terms that will accomplish the pin-pointed objective allowed by the Constitution and required to meet essential public needs. *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968). Broad prophylactic rules in the area of First Amendment freedoms are suspect. *NAACP v. Button, supra*, at 438. The breadth of the abridgement of First Amendment liberties must be viewed in light of less drastic means available to achieve the same purpose. *Shelton v. Tucker, supra*, at 488. This Court has indicated that even in the context of a criminal trial, a restraint upon expression should be a last resort. *See Nebraska Press Association v. Stuart, supra*, at 569.

Notwithstanding these constitutional restrictions on broad restraints of expression, the district court's order begins with a plenary prohibition of communication. (J.A. 124). Petitioners, relying on the

Manual, assert that this broad order is as narrow as possible because only a plenary prohibition on expression will forestall the machinations of imaginative miscreants bent on subversion of the class action device. *See* Brief for Petitioners at 18 & n.9. Were this argument to be given credence, it would rob the word "narrow" of all meaningful content.

Adequate narrower remedies are available. For example, attorneys who engage in misleading or abusive communications can be removed as attorneys for the class. Abusive parties can be removed as class representatives. The court could, where necessary, order corrective communications made at the party's or the attorney's expense. *See also* Wilson, *Control of Class Action Abuses Through Regulation of Communications*, 4 Class Act. Rep. 632, 636-38 (1975).

2. The Order Does Not Address a Demonstrated, Serious and Imminent Threat.

Governmental restrictions which encroach on First Amendment freedoms in the name of protecting the administration of justice must be based on a showing, not just a speculation, that there exists a substantive evil actually designed to impede the fair administration of justice. *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946); *Bridges v. California*, 314 U.S. 252, 270, 278 (1941). The *Manual* itself admits that class action abuse has been rare. *Manual, supra*, Part I, § 1.41 at 52.1. Moreover, many of the examples of class action abuse cited as a predicate for the order are not susceptible to cure by the restraint, *e.g.*, pre-filing solicitation, and agreements by the parties to strike the class action allegation. *See Manual, supra*, Part I, § 1.41 at 51-53; Brief for Petitioners at 15. Indeed, many of the activities sought to be prevented

have been found not to be harmful. *See Coles v. Marsh, supra,* at 189; *Zarate v. Younglove, supra,* at 1035-40.

A further requirement for restricting expression is that whatever substantive evil it embodies must present a grave and urgent threat to the interest sought to be protected. This Court has repeatedly held that speech which allegedly interferes with the administration of justice cannot be punished unless it is shown to present a "clear and present danger." *Landmark Communication, Inc. v. Virginia,* 435 U.S. 829, 844-45 (1978); *Pennekamp v. Florida, supra,* at 347. As this Court has stated,

> [f]reedom of speech should not be impaired. . . unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice . . . . The danger must not be remote or even probable; it must immediately imperil.

Craig v. Harney, 331 U.S. 373, 376 (1947); *Accord, Wood v. Georgia, supra,* at 385; *Bridges v. California, supra,* at 263.

The *Manual*, however, while citing *Craig* and *Bridges* for the proposition that the administration of justice is a protectible interest, turns to a different case, *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969), for the standard it suggests be used: a "reasonable likelihood" of threat to a fair trial. *Manual, supra*, Part I, § 1.41, at 47 n.33. But the *Manual* errs. A majority of courts that have addressed the issue of the standard to be used in restricting communications of litigants and lawyers have adopted a "serious and imminent threat" standard, which better comports with established First Amendment jurisprudence.[6/]

[6/] First Circuit: *United States v. Marcano Garcia*, 456 F. Supp. 1354, 1357-58 (D.P.R. 1978); Third Circuit: *Rodgers v. United States Steel Corp. (Rodgers II)*, *supra*, at 1008; Fifth Circuit: *Bernard v. Gulf Oil Co.* (J.A. 259); Sixth Circuit: *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975); Seventh Circuit: *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249, 251

Restraints, such as those in the district court's order (J.A. 125), on communications which "may tend" to misrepresent aspects of a lawsuit or "may create impressions tending . . . to reflect adversely" on persons or on aspects of the case, clearly do not meet this standard. In *Bridges v. California, supra,* at 263, 273, this Court explicitly rejected a "reasonable tendency" standard for restricting expression regarding pending litigation, in favor of a standard which required the substantive evil to be "extremely serious and the degree of imminence extremely high."

3. The Order Prevents Timely Speech.

6/ footnote continued

(7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers,* 427 U.S. 912 (1976), *accord, In re Oliver,* 452 F.2d 111, 114 (7th Cir. 1971); *Chase v. Robson,* 435 F.2d 1059, 1061 (7th Cir. 1970); Ninth Circuit: *Zarate v. Younglove, supra,* at 1029. Contra: Fourth Circuit: *Hirschkop v. Snead,* 594 F.2d 356, 363, 373 (4th Cir. 1979)("reasonable likelihood"); Tenth Circuit: *United States v. Tijerina, supra,* at 666 (same).

The First Amendment protects not only the content of speech but its timeliness. *See, e.g., Bridges v. California, supra,* at 252. Because of the protracted nature of civil litigation, restraints on communications could last for years. *Hirschkop v. Snead, supra,* at 373. *See also Bridges v. California, supra,* at 269. The Fifth Circuit's decision invalidating the order in the instant case came almost four years after the order was entered. (J.A. 44, 277). The *Rodgers I* plaintiffs and their NAACP Legal Defense Fund counsel were subjected to a similar restraint for over two and a half years. *Rodgers v. United States Steel Corp. (Rodgers I), supra,* at 152, 155. Such delay seriously exacerbates the First Amendment problems raised by the *Manual's* model rule and order.

Petitioners assert that no harm will occur from restraining communications that cannot be corrected on appeal. Brief for

Petitioners at 21 n.15. But this argues with equal force in favor of allowing the communications to take place, and correcting any harm on appeal. Surely the First Amendment has chosen the latter option.[7/]

4. The Order Is Vague.

Finally, the *Manual* and the district court attempt to save their order from overbreadth by including a provision which exempts constitutionally protected expression. (J.A. 98, 125). This solution merely trades overbreadth for vagueness. An eminent constitutional scholar has exemplified this dilemma with a hypothetical law: "*It*

[7/] Petitioners cite *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972) as supporting their position. Brief for Petitioners at 15. However, that case held that the appellate court could not review a trial court order *allowing* communication with class members. *Weight Watchers, supra,* at 775. From a First Amendment perspective, allowing communication and suppressing it are very different propostions and are certainly not interchangeable. *See Zarate v. Younglove, supra,* at 1032 & n.14.

shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments." Because the Constitution by itself does not provide clear enough guidelines to enable a person to decide whether or not his expression is protected, such a law will deter too much that is protected. Moreover, no expression can authoritatively be said to be protected until a court has determined it to be so. L. Tribe, *American Constitutional Law* 716, 729 (1978 ed.). *See also Zarate v. Younglove, supra,* at 1025, 1042.

The district court's order has obvious similarities to this hypothetical law, and equivalent infirmities. A vague law is one which does not provide a person of ordinary prudence with notice of what he may or may not say. The average party in a class action cannot be expected to know what speech is and is not within the First Amendment's ambit. Should the prospective

speaker prudently elect to submit his dilemma to the district judge, there is no guarantee that even constitutionally protected expression will be allowed. The order provides no standards. Because the line between protected and unprotected speech may be dim, the government must work with more precise tools in this sensitive area of First Amendment freedoms. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975); *NAACP v. Button*, *supra*, at 429.

CONCLUSION

For all the reasons stated, the decision of the United States Court of Appeals for the Fifth Circuit should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITOL AREA AND THE GEORGE WASHINGTON LAW REVIEW, AMICI CURIAE have been served this 5th day of March, 1981, by United States Mail, postage prepaid, upon the following counsel of record:

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